

NORTH DAKOTA DEFENDER

The Newsletter of the North Dakota Commission on Legal Counsel for Indigents

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The Commission

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A message from the Director . . .

CONFLICT ATTORNEYS-COMPENSATION

In all judicial districts we have cases that need to be assigned to private attorneys, whether we have public defender offices or flat fee contracts with private attorneys who take groups of cases on a monthly basis. In our areas where there are public defenders who take the majority of misdemeanor or felony indigent cases, we know that there tends to be about a 15%-18% conflict rate. Given the fact that in a years time we must handle approximately 10,000 case assignments, we have many cases that need to be "conflicted out," or assigned to private attorneys. In our larger jurisdictions where there are several contractors, most conflicts can be spread out amongst the various contractors. Even in contractor districts, there are cases (multiple party drug busts or complicated multi party juvenile cases, for example), that need to be assigned to conflict attorneys. The simple truth of the matter is that we cannot provide adequate services to indigent clients in the state without the participation of the private bar. The attorneys in the state of North Dakota have always stepped up to the plate to take indigent cases and hopefully we will continue to find attorneys willing to work for us in the capacity as conflict counsel.

Of course the sticking point for many attorneys is the pay. We pay \$65.00 an hour for their work and provide support services in appropriate cases such as private investigators, travel expenses, witness payment, etc. We discuss this pay rate all the time. Clearly the hourly rate is significantly less than attorneys charge for their private clients. However, these are not private clients; they are indigent and we are an indigent agency. One of the questions I wanted to personally answer when I first started this job and heard some disgruntlement about the hourly rate was "how far off, if at all, is North Dakota from the national norm with their \$65.00 an hour rate?" The answer is, we are not that out of the norm at all. There certainly are places that pay their indigent attorneys more than does North Dakota. In 2004, for example the New York General Assembly raised the compensation rate for court-appointed attorneys in criminal felony cases and family court cases to \$75.00 an hour, in and out of court. In Hawaii, the rate is \$90.00 an hour for work in and out of court on non-capital felonies. There are also states that are very similar, and sometimes lower, than North Dakota, such as

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Upcoming Meetings and Events

February 19, 2008 - Commission Meeting
Lewis & Clark Room, State Capitol
June 10-13, 2008 - SBAND Annual Meeting
Alerus Center, Grand Forks
Sept. 11-12, 2008 - Bench and Bar Seminar
Doublewood, Bismarck

Montana where the rate for non-capital felony cases is \$60.00 an hour. In Massachusetts, attorneys are paid \$60.00 an hour for Superior Court cases and \$50.00 an hour for District Court cases.

Many states use “caps” to pay their attorneys in felonies and misdemeanors. In Maryland, the maximum amount for a felony is \$3,000.00. In Hawaii, it is \$6,000.00. In New York, it is \$4,400.00. In Iowa, misdemeanors are reimbursed at the rate of \$60.00 an hour with a cap of \$300.00 for non-serious misdemeanors and \$600.00 for serious misdemeanors. In Arizona, misdemeanors that go to jury trial are capped at \$750.00. North Dakota does not have caps, but we do have a commission standard that if an attorney believes a felony case or misdemeanor case is going over a certain amount, they are to notify us and submit a form. We have this policy to try to anticipate larger than expected expenses for any given month. Those standard amounts are \$2,000.00 for a felony, \$850.00 for a misdemeanor, and \$850.00 for a juvenile case. Likewise those states with caps usually have a mechanism to allow attorneys to apply for special case compensation.* Clearly we understand that some cases will require more or less, depending on how it is resolved.

The issue of whether the commission should raise the rate of attorney compensation is an issue that requires a significant study of the budget, and how such a raise would affect a biennial budget. Even a 10-12% increase in the hourly rate of compensation would have a significant impact on the budget, so we need to address this issue with care and consideration. We are not in this job to try to chisel hard working attorneys out of fees. We have developed policies and programs to alleviate some of the burden of taking on indigent defense cases for private attorneys. We provide support services, when needed, such as private investigative services or evaluations. We provide free yearly CLEs. We have access to a brief bank and a list-serve to facilitate requests for information.

We are encouraging younger attorneys who might have an interest in juvenile or criminal law to take a look at our agency; our case assignments represent an opportunity to get experience in court,

a chance to interact with clients, work on pre-trial issues and appear before the Supreme Court. We would like to personally thank many of the conflict attorneys we use around the state on a routine basis. We are impressed with and very appreciative of their commitment to indigent defense cases. Any attorney who is interested in serving as conflict counsel may contact us at 701-845-8632, and we will be happy to discuss the procedure involved.

Thank you,
Robin Huseby

* The information on state felony rates was gathered from “The Spangenberg Report,” Volume X, Issue 3, July 2007. The information on state misdemeanor rates was gathered from individual state indigent defense agencies and is on file at the commission office.

Looking ahead to the Next Legislative Session

A famous military advisor once stated “It is better to deal with problems before they arise.” In that spirit, we are organizing our thoughts and plans for legislation that may be introduced or discussed in the 2009 legislative session. Several attorneys, including Robin, Jean, Kent Morrow, Bob Martin, Kevin McCabe, Trent Mahler, and others, have been gathering legislative concerns and discussing how this agency can deal with proposals for changes. We acknowledge that we are not lobbyists or have a particular political agenda, so we are looking at legislative issues that affect our agency or the whole group of indigent defense providers, not just narrow issues on certain cases. We also are looking at housekeeping matters involving statutes or situations that did not contemplate the existence of our agency.

We are hoping to receive feedback from agencies or groups that might be affected—fiscally, administratively, or substantively-by proposed changes in the topics set forth below:

- **Home Rule Counties** – In the prosecution of a home rule county’s ordinance, should the home rule county pay for indigent defense attorneys and their costs and expenses, or should our agency pay?
- **Post Conviction Relief** – Should the court determine that there is or may be some issue of law or fact in a post-conviction application prior to the appointment of an attorney? We often deal with clients who repeatedly file petitions regarding an issue that was previously raised. A change in the statute may be more in synch with North Dakota case law as it now exists.
- **Juvenile representation** – Should the parents or the “child” be responsible for providing for legal counsel and expenses of representation in juvenile court for a child who is 18-20 years of age with respect to a delinquent act committed while the child was under 18? Should the determination of indigency be based on his/her parents’ income and resources?
- **Recoupment statutes** – We are looking at revamping the recoupment statutes to have the courts order a presumed rate (as set by the commission) for certain types of cases, subject to the defendant’s right to contest that presumed amount and have a hearing. Recoupment involves several overlapping statutes.
- **Marijuana Paraphernalia cases** – Should there be a procedure for the sealing of the first offense marijuana paraphernalia conviction in the same manner that a first offense small amount of marijuana conviction can be sealed?

Please feel free to call us or write us with suggestions or discussion on any of the above topics, or new topics that you think we should address. We would like to know if any of these topics are controversial to any particular group, and if so, why. Conversely, are there persons or groups who support changes in these areas?

FEATURED CONTRACTOR

... Pete Furuseth

Pete Furuseth is a sole practitioner whose office is located at 417 1st Avenue East, Williston, North Dakota. He received his law degree from the UND School of Law in 1984 and was also admitted to the North Dakota Bar in 1984. He also has an undergraduate degree from UND in political science. After graduating from law school, Pete worked at a law firm in Williston for two years before successfully running for Williams County State’s Attorney. Pete was State’s Attorney for Williams County from 1986 through 1994. After completing his eight years as State’s Attorney, Pete decided to try something new, and he worked in the area of oil and gas land work and as a trust officer for American State Bank & Trust in Williston, North Dakota. He returned to private practice in 1997, and has had his own office since 2004. Pete does contract work on an as needed basis.



Pete has been married to his wife, Laurie, for 25 years. Laurie is a CPA with an office also located in Williston. They have two children, Greta and Maren, both of whom are college students. Pete is actively involved in local sporting events and still plays noon time basketball.

Pete describes his experience as a contract defense attorney for juvenile court as follows:

“I enjoy working in the juvenile court because of the immediacy of the results. Matters in juvenile court seem to move much swifter than any other court, and there are ways that you can help the children, rather than just punish them. I also like working with the parents of the children. I try keep in mind that no matter how poor some of their parenting skills seem to be, these are still the biological parents and deserve a strong legal representation. Most of the children that I work with in juvenile court seem to suffer from a lack of direction, either because of single parenting or divorced parents that continue to battle over the child.”

“I also enjoy the juvenile court work because it gives me the opportunity to continue to work in a courtroom setting. I enjoy practicing in the Northwest Judicial District and I feel very comfortable practicing in front of both Judge Gerald Rustad and Judge David Nelson. Both judges work very well with the local bar and make efforts to make sure that there is a certain comfort level for the attorneys practicing in front of them.”

“All in all, I enjoy the work in the juvenile court and the type of public service it allows me to to be a part of on an ongoing basis.”

Thanks, Pete, for your dedicated service to indigent defense.

BRIEF BANK

Attorneys have submitted briefs on the following topics:

Crimes

- ingestion of controlled substance

Extradition

- no extradition or rendition proceeding properly before the court
- invalid waiver of extradition

Rules of Discovery

- sanctions for violation
- office policy of not providing Rule 16 discovery material until after the preliminary hearing should result in suppression of undisclosed evidence
- preventing use of prior convictions for felony DUI enhancement

Polygraphs

- admissibility of favorable results

Miranda

- capacity of mentally ill defendant to waive rights
- custodial factors
- failure to cease interrogation when defendant invoked right to remain silent
- interrogation of partygoers
- traffic stop questioning of driver
- voluntariness of waiver

Search and Seizure

- standing/reasonable expectation of privacy
- staleness of information on which search warrant was issued
- good faith exception
- validity of consent for urinalysis after arrest
- deficiencies with urinalysis evidence of ingestion of controlled substance

Change of venue

- change of venue on basis of pretrial publicity

Restitution

- showing required to demonstrate inability of defendant to pay ordered restitution

If you are interested in receiving a copy of one of these briefs, please contact the Valley City office. If you have a brief to submit, please do so and help your fellow attorneys avoid reinventing the wheel! Please redact any confidential information before submitting it. Thank you.

Update on Standards

At the October meeting, the Commission adopted a new version of the Guidelines to Determine Eligibility for Indigent Defense Services, and new applications for services. The Guidelines and applications were updated to reflect recent legislative changes, and to hopefully make the eligibility determination process easier on both the applicants and the court.

The Commission also adopted a modified version of the “Standard Definition of Case Assignment - Juvenile Matters” to include a definition of an “unruly” case type.

The Commission’s Guidelines, Standards and Policies can be viewed on the Commission’s website: (www.nd.gov/indigents). You may also contact the Valley City office at 701-845-8632 for copies.

Internships

The Internship/Externship program is up and running in the Grand Forks Public Defender office. Through an agreement with UND Law School, up to two interns will be working at the Public Defender office each semester, learning about criminal defense, public service, and the workings of a law office. The interns will be given the opportunity to meet with clients, attend court hearings, research and write memoranda and briefs, and organize files.

This past fall semester, third year law students, Tony Peska, and Rob Quick, were the Grand Fork’s office’s first externs. They were a great help in the office. In addition to research and writing, the use of interns allowed the office to have better and more frequent contact with clients. The interns were able to meet directly with clients, they interviewed witnesses, and followed through on leads. According to David Ogren, the Grand Forks supervising attorney, the interns did witness interviews in an aggravated assault case, and from the information the interns obtained, the case was dismissed.

Internship programs are a great way to get law students interested in public service, which is really the only way to ensure a successful indigent defense program in any state. If the internship program continues to be successful in Grand Forks, the Commission will look at the possibility of internships or externships in the other public defender offices throughout North Dakota.

Assorted Odds and Ends . . .

Now available online is a wonderful resource for working with the **Indian Child Welfare Act** (ICWA). “A Practical Guide to the Indian Child Welfare Act” can be found at www.narf.org/icwa. The guide contains frequently asked questions to many topics, including the application of ICWA, jurisdiction, intervention, and placement. There are links to the various state and federal statutes, and to case law for each state. There are even flow charts for many topics, including one to determine if ICWA applies to your case. If you work with juvenile law, you may want to consider downloading a free copy of the guide from the website.

Don’t forget about **UND’s Central Legal Research** when you need an issue researched, or would like another point of view. CLR employs second and third year law students to work on legal issues for judges, indigent defense attorneys, and prosecutors, under the direction of a licensed attorney. Give them a try - you’ll be glad you did!

Rule 16 of the North Dakota Rules of Criminal Procedure applies to probation revocation proceedings. State v. Hemmes, 2007 ND 161.

Next Commission Meeting

The next Commission meeting is scheduled for February 19, 2008, in Bismarck. If you have any business for the Commission, please contact the Valley City office as soon as possible to get placed on the agenda. We provide notice of the meetings to the Secretary of State’s office, and the meetings are open to the public.

UPCOMING TRAINING

The Commission tentatively plans on joining the North Dakota State Bar Association and the state Judiciary for a joint Bench and Bar Seminar to be held on September 11 and 12, 2008, in Bismarck, ND. This seminar will be strictly geared toward the practice of criminal law, and there will be plenary as well as break out sessions. This training will be at no cost to public defenders, indigent defense contractors, and legal aid attorneys, and for our attorneys it will be held in lieu of the summer indigent defense CLE. We are very excited about the varying groups to come together and the diverse line up of speakers and sessions is going to be of interest to everyone. Some of the possible sessions will deal with eyewitness identification, DNA, DUI defenses, and US case law review. Other topics are being explored at this time.

(Some of the) Commission Goals . . .

- ** Developing Minimum Attorney Performance Standards in Appellate and Juvenile matters.
- ** Opening of the public defender offices in Bismarck (late summer, 2008), and Fargo (late fall 2008).
- ** Preliminary work on budget projections for 2009-2011 biennium.
- ** Fine tuning of the web-based attorney case reporting system.

**WE HOPE YOU HAVE A
VERY HAPPY NEW YEAR!**

ND Commission on Legal Counsel for Indigents
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